1978

Alice Kesler v. David 0. Kesler, Trustee of the Estate of Alice Kesler; David 0. Kesler, An Individual, and Helen Kesler, His Wife : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

ALICE KESLER, Plaintiff-Appellant, vs. DAVID O. KESLER, Trustee of the Estate of Alice Kesler; DAVID O. KESLER, an individual, and HELEN KESLER, his wife, Defendants-Respondents.	)	No. 15520

BRIEF OF APPELLANT

Appeal from the Judgment of the Fifth District Court of Millard County, State of Utah

J. Harlan Burns, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

ALICE KESLER,	:	
Plaintiff-Appellant,	:	
vs.	:	No. 15520
DAVID O. KESLER, Trustee of the Estate of Alice Kesler; DAVID O. KESLER, an individual, and HELEN KESLER, his wife,	:	
Defendants-Respondents.	:	

BRIEF OF APPELLANT

NATURE OF THE CASE

In this matter, Alice Kesler, the Plaintiff-Appellant, and the mother of David Kesler, the Defendant-Respondent, seeks a judgment from the above entitled Court declaring the document marked Exhibit No. P-3, entitled "Warranty Deed", invalid, said document purporting to convey a joint tenant interest in real property from the Plaintiff-Appellant Alice Kesler to the Defendant-Respondent David Kesler.

RELIEF SOUGHT ON APPEAL

Appellant seeks to reverse that portion of the lower court's verdict wherein said court held valid the joint tenancy deed. The judgment involved in the remainder of

the case covering the property left in the revocable trust was stipulated to.

STATEMENT OF FACTS

Alice Kesler, age 85, in the summer of 1971, hired Eldon Eliason, attorney at law, to prepare a revocable trust for her, naming Alice's son David Kesler as Trustee in Trust of said Revocable Trust. Pursuant to the Trust prepared by Eliason, Alice deeded certain real property to her son David in trust as her Trustee. On September 20, 1971, Mr. Eliason, while still acting as Alice's attorney, prepared a Statement of Withdrawal purporting to withdraw certain properties from the Trust, the same to be executed by Alice. Said Statement of Withdrawal included, however, an additional 640 acres which was never a part of the trust property. Alice's testimony indicates that her signature appears on the Withdrawal, but that she has no recollection of signing the same, or of instructing either her Trustee David Kesler or Eldon Eliason, her attorney, to prepare the Statement of Withdrawal. The property in the Statement of Withdrawal includes Alice's home and two rental units, all located in Fillmore, Utah, as well as 640 acres of grazing ground located West of Cove Fort, Utah, about 40 miles south of Fillmore.

On the same date, to-wit: September 20, 1971, Eliason, while still acting as attorney for the said Alice Kesler,

did prepare a Quit Claim Deed conveying the same property included in the Statement of Withdrawal with the exception of the 640 acres, from David Kesler as Trustee, to Alice Kesler, Settlor, his mother. David claimed at the trial to have no knowledge of the facts surrounding the preparation of the Withdrawal or the Quit Claim Deed, but admits executing the Quit Claim Deed and had custody of it at the time of trial. David further stated with regard to both documents that he did not give Eliason any instructions with regard to the preparation of the same, and Eldon Eliason could not recall whether his instructions came from Alice Kesler or David Kesler, but thought that they came from both. Alice denied giving Eliason any instructions regarding the transaction.

On the 5th day of October, 1971, after the withdrawal, Alice wrote a letter to David asking that her Fillmore property be withdrawn from the Trust. Alice says that she does not recall writing said letter, but did indicate that the same might have been dictated to her by someone else, but was reluctant to tell the court the name of the person who dictated the letter. It is interesting to note that the letter requesting the property to be withdrawn from the Trust was written some 15 days after the execution of the Statement of Withdrawal, withdrawing the property from the Trust, and the Quit Claim Deed transferring the property from Trustee David Kesler to Settlor, Alice Kesler.

In July, 1972, Alice Kesler, while David Kesler was acting as her Trustee in Trust and while Eliason was still Alice's attorney, prepared a Will while the Trust was still in effect. Said Will, pursuant to Paragraph 4, Subparagraph 5, Page 3, gives the bulk of her property to David Kesler, her Trustee in Trust, and does not comply with the terms as set forth in the Trust Agreement (See Exhibit D-9, and Exhibit P-1).

In August, 1972, Alice Kesler and David Kesler as Trustee in Trust for Alice Kesler, commenced an action against Joseph Kesler and Calvin Kesler, two of the other children of Alice Kesler and Otto Kesler, to recover possession of certain real porperty from Joseph and Calvin Kesler located near Cove Fort, Utah. Said lawsuit was partially consummated and Alice Kesler was given possession and ownership of said property in question on the 6th day of March, 1973. Shortly thereafter, on or about the 9th day of March, 1973, a Warranty Deed was prepared by Fred F. Finlinson, attorney at law, conveying all of the property covered by the Statement of Withdrawal referred to heretofore herein and marked as Exhibit P-4, from Alice T. Kesler to Alice T. Kesler and David O. Kesler, Grantees as joint tenants with full rights of survivorship, and not as tenants in common. This deed was also made and prepared by Mr. Finlinson while David Kesler was acting as Trustee in Trust for Alice Kesler. The testimony

surrounding the Warranty Deed is to the effect that David and Alice went first to Eldon Eliason to have him prepare such a document, but Mr. Eliason felt that he should not prepare such a document for fear that he would be criticized because of a conflict of interest. He testified further that he though there might be something wrong with him preparing such a deed because he purportedly represented Alice Kesler in the preparation of the Trust, but also felt an obligation to David Kesler as Trustee of the Trust, and therefor, Eliason declined to prepare the deed and he further testified that he refused to give any legal advice with regard to the effect of such a Warranty Deed.

After Mr. Eliason declined to give any advice or represent Alice or David with regard to the preparation of the purported Warranty Deed, David and Alice journeyed to Salt Lake City to converse with Mr. Fred Finlinson, the attorney who subsequently prepared the deed in question. Mr. Eliason, while not being willing to aid Alice or David in any way in the preparation of the Warranty Deed, also indicated by his testimony that he did not refer them to any particular attorney, yet they ended up in the law offices of the said Finlinson whose signature appears on the original Complaint in the action in the lower court entitled "Alice Kesler and David Kesler, Trustee, vs. Joseph Kesler and Calvin Kesler", bearing the Civil No. 6120. Finlinson, however, denied ever putting his signature on the Complaint, or knowing it was there, yet attorney Eliason

said that if Finlinson's signature appeared on the Complaint in question, that Eliason signed the same with Finlinson's permission. In any event, there was some connection, if not a close connection with regard to the matters involving the Keslers and Finlinson and Eliason. Finlinson further testified that he was familiar with Alice and David's case against Joe and Calvin. Finlinson testified that he advised both Alice and David Kesler generally as to what a joint tenancy deed was, but when asked specifically what he told them, he could not recall. In answer to the question as to whether or not he told Alice Kesler with regard to the deed in question that she could never revoke it or recover her property, he said that he had no recollection of the question ever being covered, that it never came up, nor was it ever discussed. He also indicated that there was no discussion with regard to a Will, nor did he give her any advice relating to life estates, nor was there any discussion with regard to the same. David Kesler had no recollection of what was said with regard to the joint tenancy deed, except he concluded that Mr. Finlinson was a thorough man and that he gave a good explanation of the effect of a joint tenancy deed. Mrs. Kesler testified that she had no recollection of executing any document in Finlinson's office, but stated that she went there to discuss the results of her case with Joe and Calvin, the same having been finalized just two days before the preparation of the Warranty

Deed in question, and she further testified that it was her concern to know whether or not the joint tenancy created between her and her husband, Otto Kesler, was valid as determined by the lower court herein and whether or not the same would hold up against Joe and Calvin's claim on the property at Cove Fort on appeal.

The only notes that Mr. Finlinson made with regard to the transaction are found on the bottom of a copy of the Warranty Deed in question, which David's attorney submitted as evidence to the lower court and the notes are quoted as follows:

"Mrs. Kesler and Dave came in and reported the Judge's decision and Mrs. Kesler expressed her determination that Joe and Calvin may receive nothing." (See Exhibit D-8) (emphasis added)

Alice further testified that she told her son David that she wanted him to have her home in Fillmore (not the 640 acres located near Cove Fort or the rental property or the vacant lot in Fillmore) described in the Warranty Deed, after her death, and not before. She further stated that she wanted a Will, and talked to David Kesler about a Will. She said that she loved and trusted David, and chose him as her Trustee in Trust because she loved him and trusted him, and that he was the only one that she felt that she could trust. She further testified that she would have signed anything that David put before her, while

he was acting as her Trustee, and that David did at times bring certain documents to her home in Fillmore for her signature and that if, in fact, she signed the document entitled Warranty Deed that the title was covered up and she thought she was signing a Will.

She was very emphatic in stating that she never intended that David have anything before her death. David also testified that she told him she wanted him to have her home located in Fillmore after her death, that David was the only one that said he liked the arrangement and the floor plan and that because he said he liked it, she wanted him to have it. David's testimony clearly indicates that the only property that was ever discussed between David and Alice with regard to David having the same after the death of Alice, was her home in Fillmore.

The evidence clearly showed without contradiction that Alice personally paid from her own funds, all of the real property taxes, personal property taxes, maintenance, repairs, remodeling (furnace and roof), painting, etc. on the rental units. David never paid one penny for any of the aforementioned items. The best testimony that David could come up with was to say that one time he hauled a load of trash to the dump for his mother, using his mother's pickup which she gave him at a cost, according to David's own testimony, of approximately $4,000.00.

Alice Kesler testified that all of the proceeds

received as rent from the rental units were put in her bank account and she spent the money the way that she wanted to. She further testified that the money was hers earned from her rental units which she bought and paid for, along with Otto Kesler, and David had no right to any of the money. David agreed to all of these facts in this paragraph and the foregoing one. David Kesler further testified that he never reported any income received by him on his Federal or State Income Tax Return after the purported Warranty Deed was made purportedly conveying a one-half interest in the property to him. David further testified that he did not cause to be filed or advise Alice to file as her Trustee in Trust for her, a gift tax return when he obtained the purported Warranty Deed from Alice. Alice further stated and David agreed, that Alice had a right to mortgage or sell the property if she so desired and keep all of the proceeds received therefrom without consulting David. In fact, a sale was consummated on one of Alice's vacant lots located in Fillmore, and the proceeds derived therefrom were deposited to the account of Alice Kesler. The money, however, had to be paid back to the purchaser because Alice could not deliver clear title to the vacant lot because it was tied up by her other two sons, Joe and Calvin.

The question way put directly to David Kesler as follows:

"Q: Have you ever paid any taxes on any of these properties covered in this Warranty Deed (P-3)." (emphasis added)

David's answer was as follows:

"A: Mama has always paid her own taxes on her property." (emphasis added)

Mother testified unequivocally that she thought she was signing a Will willing her home in Fillmore to David (Not the 640 acres in Cove Fort or the rental units, or the vacant lots in Fillmore), which David was not to get, but which was included in the purported Warranty Deed (Exhibit P-3), and that the Will which Alice thought she had signed was not to be recorded until after Alice's death. She further testified that it was her intent that David have her home in Fillmore not immediately, but after her death.

David's testimony indicated that he paid nothing for the real property, but that mother told him that he had not received as much as the others, so he should get more after her death, yet the evidence shows as given by David, that he received an $11,000.00 swather and bailer, and a $4,000.00 pickup truck in the spring and summer of 1973, while acting as Alice's Trustee. David said he felt that he had some rights in the property, but he certainly did not intend by his testimony to exert such rights until after his mother's death.

Reference is made to Exhibit D-7, which further illustrates and supports Alice's testimony that she did not intend to give David any present interest in her properties in Fillmore or Cove Fort, until after her death, where she states the following:

"At this time I would like all my Fillmore property taken out of the trust. I want you to receive this property after my death, to use the income of or sale of, as you see fit. I am trusting you. . ." (emphasis added)

D-10 was also introduced by the defense to show Alice's intent, and reference is specifically made to that part which the defense relies upon located on Page 4 of said D-10, wherein Alice states that:

"We went to all that expense of building the museum and Mary and LeGrande and the boys and their wives got the whole benefit. Never have you (David) had a break with the others, but earned it the hard way."

It is clear from the letter that the "we" which she refers to in building up the museum, was Alice and Otto, her husband, and not Alice and David, because David never did anything to help build up Cove Fort. He left the Fillmore area in 1946 for Montana, and has been there continually ever since, with the exception of his purported numerous trips from Montana to Fillmore to help his mother.

ARGUMENT

Point I

THE LOWER COURT ERRED WHEREIN IT DECLARED THAT JOINT

TENANCY WARRANTY DEED WAS VALID.

There are various and numerous requirements which affect the validity of a deed. The law covered herein, however, relates only to those legal points pertinent to the facts in question which affect the validity of P-3, the purported Warranty Deed.

One of the prime requisites required to make a deed valid, is delivery, and delivery must be determined by the intent of the Grantor, taking into consideration all of the surrounding facts relating to said deed and the preparation thereof. The mere fact that a deed is prepared and executed by the Grantor and found to be in the hands of the Grantee, does not in and of itself, constitute a valid delivery. To make the delivery of a deed valid, the Grantor must intend to transfer to the Grantee, irrevocable possession, actual or constructive, of the instrument in question, and the Grantor must also intend that an immediate conveyance of title to the Grantee be made according to the tenor of the instrument.

The important element in all cases of delivery is the intention of the Grantor and since the intention of the Grantor is entireley a subjective matter, it must be determined by any and all indicia that may logically appear to bear upon it, and in all cases, there can be no passage of title to the Grantee without a valid legal delivery.

Other circumstances which make the delivery of a deed

invalid which might otherwise be valid, is a mistake on the part of the Grantor, and such a mistake may be unilateral in nature. Fraud may also nullify the delivery of a deed which may otherwise be valid and the fraud may consist of misrepresentation as to the nature of the document being signed, overreaching, and taking advantage of older persons, family members or confidential relationships.

Undue influence may affect the delivery of a deed. The nature of such undue influence which is exercised by the Grantee that nullifies the delivery may be the same as that which would serve to invalidate a Will. That is, the passage of the deed into the Grantee's possession is not the result of the real intention of the Grantor, but of the actions of the Grantee which have in effect imposed his own will on the Grantor with the result that the apparent delivery is rendered invalid in limine.

A benefit received by a Grantee who stands in a confidential relationship with the Grantor, is presumed to be the result of fraud and undue influence, and hence invalid.

In most jurisdictions, when this occurs, the burden shifts from the Grantor to the Grantee to prove the fairness and good faith of the transaction. There is obviously no presumption in favor of a Grantee in possession of a document entitled Warranty Deed of a valid delivery where there is a confidential relationship, to-wit: a son and an aged mother, plus the added fact of a fiduciary relationship

to-wit: a son acting as trustee of an aged mother's estate.

We have in this case, before the Court, one of the most common of all conditional deliveries, to-wit: death of the Grantor, as conditicn of possession and delivery. The Grantor here gave possession of the document which is entitled Warranty Deed to the Grantee, with the intent that any and all rights of the Grantee to the occupancy, possession, right to rents, obligation for taxes, and title to the property be deferred until after the death of the Grantor. In such cases the criteria for determining whether or not there has been a legal delivery is the intention of the Grantor to convey to the Grantee, a present estate in the property during the Grantor's lifetime, regardless of the fact of physical possession of the deed, if it is the Grantor's intention the document made shall not operate to convey any present estate to the Grantee until after Grantor's death, the deed is held in every case to be ambulatory and testamentary in character and hence invalid for want of execution as required by the applicable statute of Wills.

Such facts as occupancy, possesion and acts of dominion over the real property become important where the question has arised as to the Grantor's intention to make a delivery of the deed. Certainly such acts performed by the Grantor are evidence of ownership of the property and hence give rise to an inference of non-delivery in the instant case.

23 Am.Jur. 2d Sec. 6, p. 82, states as follows:

> "Whether an instrument is a deed or will depends primarily upon its operation, and not upon its form or manner of execution. The essential characteristic of a testamentary instrument is that it operates only upon and by reason of the death of the maker; during his lifetime it is ambulatory and revocable. Hence, the maker by its execution parts with no right and divests himself of no modicum of his estate. It is fundamental, on the other hand, in order that an instrument may be operative as a deed, that it pass a present interest, although it is not necessary that the grantee take a present estate in the property conveyed." (emphasis added)

and further in 23 Am.Jur. 2d Sec. 81, p. 133, it states that:

> "The intention of the parties is an essential and controlling element of delivery of a deed. Intention has been called the 'essence of delivery' and not only is it often the determining factor among other facts and circumstances, but is the crucial test where constructive delivery is relied upon. Categorically stated, the rule is that it is essential to the delivery of a deed that there be a giving of the deed by the grantor and a receiving of it by the grantee, with a mutual intention to pass the title from the one to the other. . . ." (emphasis added)

and in 23 Am.Jur. 2d Sec. 82, p. 134, it further states that:

> "The intention of the grantor that bears significiantly on the question of delivery is his intention with respect to vesting the legal title of the land in the grantee. To be valid and effective, the act of delivery of a deed must be accompanied by the intent that it shall become presently operative as such and presently pass title. . . . .
>
> Therefore, the inquiry is simplified by asking, did the grantor intend the property to pass?. . ." (emphasis added)

23 Am.Jur. 2d Sec. 83, p. 135, continues as follows:

"Since the intent of the grantor is a paramount consideration on the question of the delivery of a deed, a delivery which will pass title occurs only when the grantor parts with his dominion over the deed with the intention to pass title." (emphasis added)

In Gilbert v. McSpadden, (Tex. Civ. App.) 91 SW 2d 889, the court stated that:

"In order to constitute a delivery of a deed, the facts and circumstances in evidence must show an intention on the part of the grantor that the deed shall presently become operative and effective. . . ." (emphasis added)

It is further stated in 23 Am.Jur. 2d Sec. 88, p. 1, that:

"In most cases,. . . delivery is to be inferred from circumstances which by their very nature are equivocal and depend upon the subjective state of mind of the grantor. In such cases delivery becomes a question of fact and cannot be determined as a matter of law. This may be true even where the deed is placed in the actual possession of the grantee. Where the question of delivery is dependent entirely upon intention, it is to be determined from all of the evidence bearing upon the issue, including the conduct of the parties. The questions whether the requisite intent to make delivery existed, and whether the grantor executed his intention to pass title by a sufficient delivery are both questions of fact. . ." (emphasis added)

23 Am.Jur. 2d Sec. 89, p. 138, further states that:

"A sufficient delivery of a deed requires that there be a manifestation of the intention of the grantor to relinquish all dominion and control over the instrument and to have it become presently effective as a transfer of title . . .

. . . if he (the grantor) does not evidence an intention to part presently and unconditionally with the deed (and title to the property), there is no delivery." (emphasis added)

23 Am.Jur. 2d, Sec. 91, p. 141, states that:

"It is clear that if the grantor hands the deed to the grantee personally, without saying or doing anything to qualify the significance of such act, an effective delivery is made. Such direct change of physical custody with intent to deliver has been called 'absolute delivery'. It is equally clear, however, that such transfer of the possession of the deed from the grantor to the grantee must be made with the intention of passing title. . . ." (emphasis added)

23 Am.Jur. 2d, Sec. 100, p. 150, states that:

"If a deed is executed for delivery only after the grantor's death, it is merely a will regardless of its name and is valid only when executed in the form and manner provided by law for the execution of wills. And this is true even when physical possession of the deed has been surrendered to the grantee, if the grantor did not presently intend to part with the control thereof so as to divest himself absolutely of the title." (emphasis added)

In Henneberry v. Henneberry, 164 Cal. App. 2d 125, 330 P.2d 250, the court stated that:

"Even if a deed is manually delivered, but the evidence shows that the parties or the grantor intended the document to become operative only upon death, it is testamentary in character, and void as a deed."

23 Am.Jur. 2d Sec. 105, p. 156, states that:

"Not only must the grantor have intended to put reclamation of the deed beyond his power, but also, technically at least, he must have intended that title to the property immediately pass to the grantee. . .

. . . the issue may be stated as being: Did the grantor intend to divest himself of his property and to give immediately to the grantee the right to the fee?" (emphasis added)

23 Am.Jur. 2d Sec. 109, p. 159, further states that:

"The controlling factor is the intention of the parties, especially the grantor, to make delivery, and this intention may be inferred from their words and acts and from the circumstances preceding, attending, and subsequent to the execution of the instrument." (emphasis added)

23 Am.Jur. 2d Sec. 118, p. 166, further states that:

"The conduct of both the grantor and grantee showing exercise of, or failure to exercise, ownership and control of the deeded property, also may be indicative of the grantor's intent with respect to delivery. The fact that the grantor continues to exercise acts of ownership and authority over the premises, such as the collection of rents and profits, or the sale or attempted sale of a portion thereof, is inconsistent with the theory of an intentional delivery, operative and effectual to pass title." (emphasis added)

In Martinez v. Archuleta, 64 NM 196, 326 P.2d 1082, the court said that:

"Where the grantor retains possession and control of the property described in a deed intending that there be no delivery thereof until after his death, the facts that grantee had possession of the deed and had procured its recordation do not establish that title passed to him." (emphasis added)

POINT II

EFFECT OF FRAUD UPON THE VALIDITY OF A DEED.

23 Am.Jur. 2d, Sec. 142, p. 189, has the following to say with regard to frauds effect on the validity of a deed:

". . . fraud may be presumed from a conveyance by a principal to his general agent, who has control and management of all his affairs and is his confidential adviser and friend." (emphasis added)

POINT III

THE EFFECT OF UNDUE INFLUENCE ON THE VALIDITY OF A DEED.

Undue influence is a difficult term to define, and the determination of undue influence depends upon the circumstances of the particular case and therefore makes any precise definition difficult.

In Vol. 23 Am.Jur. 2d Sec. 148, p. 193-194, it states that:

> "Undue influence has been referred to as a species of constructive fraud which the courts will not undertake to define by any fixed principles lest the very definition itself should furnish a guide to the path by which its consequences may be evaded. Whether improper influence was exercised must usually be inferred from the facts and circumstances of the particular case, such as the situation of the grantor and his relation to others, his condition of health and its effect upon body and mind, his dependence upon, and subjection to, the persons claimed to have influenced him, and their opportunity to wield such influence." (emphasis added)

In Pitts v. Hawkins, 264 Ala, 428, 87 So. 2d 835, the court, in discussing undue influence, had this to say:

> "In cases of a conveyance of all of one's property, where the grantor is aged and feeble, only slight evidence of undue influence is necessary to invalidate the deed."

and in Leuba v. Bailey, 51 Minn. 193, 88 NW 2d 73, the court said:

> "The test of undue influence is not its effect upon a grantor of average intelligence and strength of character, but is effect upon the person in question, taking into consideration his age, intelligence, health, and strength of character." (emphasis added)

POINT IV

THE EFFECT OF A CONFIDENTIAL RELATIONSHIP UPON THE VALIDITY OF A DEED.

Referring to the effect of a confidential relationship and the effect of the validity of a deed, Vol. 23 Am.Jur. 2d Sec. 149, p. 195, states that:

> "The existence of a family or a confidential or quasi-confidential relationship between the grantor and the grantee in a deed is an important factor in determining the presence of undue influence in the execution of the deed, especially if it appears that the beneficiary was in honor bound to prefer the interests of the donor to his own. It is not the relationship itself, but rather the abuse of it, that constitutes undue influence. Where a confidential relationship operates to cause the substitution of the will of the grantee for that of the grantor in a deed, the deed may be avoided.
>
> Such relationship exists between . . . parent and child,. . . . principal and agent.
>
> . . . Where a confidential relation is shown to exist between the parties to a deed and where the grantee, who is the beneficiary, is the dominant spirit in the transaction, the law raises a presumption of undue influence, or, as is sometimes said, a deed is prima facie voidable in such a case." (emphasis added)

Vol. 23 Am.Jur. 2d Sec. 154, p. 198, further states that:

> "Where a confidential relationship is shown to exist between the parties to a deed, and where the grantee, who is the beneficiary, is the dominant spirit in the transaction, the law raises a presumption of undue influence, or as is sometimes said, the deed is prima facie voidable in such case. This imposes upon the grantee, or the party contending that the deed should be upheld, the burden of repelling that presumption and of proving the fairness of the transaction and that the deed was not obtained by undue influence. It has been said that to sustain the burden of proof cast upon him when a presumption of undue influence exists, the grantee must show in the clearest and most satisfactory manner that the conveyance is one which is, in every particular, worthy of

receiving the sanction of a court of equity. Stated differently, the presumption of invalidity of a deed due to fiduciary relationship may be overcome by clear and convincing evidence that the transaction was fair, voluntary, and free from any taint of fraud, coercion, or overreaching.

Applying these principles, where there is a presumption of undue influence on the part of a child, the grantee in a deed, as against his parent, the grantor, the child (grantee) must show that the parent acted upon competent and independent advice of another or must show such facts as will satisfy the court that the dealing was at arm's length or that the transaction was had in the most perfect good faith on his part and was equitable and just between the parties." (emphasis added)

POINT V

THE EFFECT OF A MISTAKE ON THE VALIDITY OF A DEED.

Relating to the effect that a mistake has on the validity of a deed, 23 Am.Jur. 2d, Sec. 155, p. 202, states that:

"Although a deed in terms expresses the intention of the parties, if there is a material mistake as to the property to which those terms apply, such as to its identity, situation, boundaries, title, amount, value, and the like, a court of equity may grant appropriate relief. Mistake as to the quantity of land in the tract conveyed is remediable in equity, even to the extent of setting aside the deed.

. . . Relief from mistake in a deed may be granted in proper cases even though the mistake is unilateral as distinguished from a mutual mistake, and a mistake of law may be relieved against when attended by misrepresentations, undue influence, misplaced confidence, or some other special circumstances justifying interposition of equity." (emphasis added)

POINT VI

THE EFFECT OF A UNILATERAL MISTAKE UPON THE VALIDITY OF A DEED.

23 Am.Jur. 2d, Sec. 156, p. 203, regarding the effect of a unilateral mistake on the validity of a deed, states that:

> ". . . It is generally agreed that equitable cancellation may be decreed on the ground of a material mistake made by one party only to a deed, including material mistake as to identity, situation, boundaries, title, or amount of land to be conveyed. A deed may be canceled for a unilateral mistake on the part of the grantor which renders it inequitable for the grantee to have the benefit thereof, even though the parties dealt at arm's length and on an equal footing and the grantor was negligent, if his mistake was not a breach of duty." (emphasis added)

POINT VII

LEGAL ASPECTS FOR DETERMINATION OF WHETHER IT IS A DEED OR A WILL.

23 Am.Jur. 2d, Sec. 176, p. 221, states that:

> ". . .So far as general principles are concerned, whether an instrument is a deed or will depends primarily upon the intention of the maker of the instrument, which may be evidenced by the manner of execution and the characteristics of the instrument, and, in the final analysis, upon the manner in which the instrument is to operate. It is fundamental that while possession or enjoyment of an estate may be deferred, a deed to be operative must pass a present interest, whereas an instrument testamentary in character operates only upon and by reason of the death of the maker, who, by its execution, parts with no rights and divest himself of no modicum of his estate.
>
> . . . The general test, therefore, is as to when the instrument is to take effect as a conveyance of the property described or of any interest therein." (emphasis added)

In First Security Bank of Utah v. Burgi, 251 P.2d 297, 122 Ut. 445, a case involving a deed and bill of sale executed by a father in favor of a son, said documents being executed during the father's lifetime but the delivery and validity of the same being questioned after the father's death, and the questions being raised as to whether or not the document which was entitled a deed, was in fact a deed or a will, the court stated the following:

> "The testimony reveals that the deceased clearly intended that the deed and bill of sale pass the property to the defendant. The facts and circumstances, however, support the trial court's finding that the deceased had no intention to pass title immediately, but that such deed and bill of sale were to become operative upon the death of the decedent. Under such circumstances the deed and bill of sale were clearly testamentary in character, and intent and were inoperative since they did not conform to statutory requirements for testamentary disposition. In re: Alexander's Estate, 104, Utah 286, 159 P.2d 432." (emphasis added)

In Stanley v. Stanley, 97 Utah 520, 94 p.2d 465 (1939), an earlier case which involved a deed recorded after the death of grantor, it appeared that subsequent to its execution the alleged grantor separated from his wife, the grantee, and that the said grantor exercised all the indicia of ownership of the property conveyed, such as redeeming the property from tax sales, mortgaging it with the knoweldge of the alleged grantee, collecting rents, paying taxes, etc. and the court held admissible in evidence testimony in the course of these various transactions that he had repeatedly stated that he was the owner of the

property and that the deed in question because of the acts of ownership on the part of the grantor, was void.

POINT VIII

FIDUCIARY RELATIONSHIP

In discussing a fiduciary relationship similar to the one in this case, the court in Merritt v. Easterly, (1939) 226 Iowa 514, 284 NW 397, said:

> "A grantee who acted as the general agent and guardian in fact of his aged and infirm aunt at the time she made deeds of gift to him has the burden of proving affirmatively that he took no advantage of her by reason of their relationship and that she acted voluntarily, with freedom, intelligence, and full knowledge of the facts."

In another case similar, the court stated that:

> "It is presumed that a deed from an aged grantor in favor of one who is her farm supervisor and close friend is the result of fraud and undue influence because of the confidential relationship and places upon the grantee the burden of proving the contrary." McNeill v. McNeill, (1943) 223 NC 197, 25 SE 2d 615.

Again, in Jones v. Boothe, (1960), 270 Ala, 420, 119 So. 2d 203, the court said:

> "In transactions inter vivos where the parties stand in confidential relationship and the grantee who is the beneficiary, is the dominant spirit in the transaction, the law raises a presumption of undue influence and casts upon the grantee the burden of repelling such presumption by satisfactory evidence."

and again, in Hilliard v. Shellabarger, (1949) 120 Colo. 441, 210 P.2d 441, the court said:

> "It is an error of law to place upon the party

asserting it, the burden of proving fraud and undue influence where the parties to a deed stood in a confidential relationship. The burden is on the beneficiary of the transaction to prove that it was fair, just and equitable."

and in 13 Am.Jur. 2d, Sec. 64, p. 541, it states:

"A party seeking cancellation of an instrument on the ground that its execution was brought about by undue influence, must prove this fact but his burden of proof is aided by application of a theory that the existence of a confidential relationship raises a presumption of the exercise of undue influence, and the party denying that the instrument in question was produced by undue influence has the burden of refuting that presumption especially where the transaction is without consideration or is in the nature of a gift to him.

. . . the presumption being always against the party having superior dominant influence or control." (emphasis added)

Considering the law and the facts as set forth herein, equity and conscience dictate that the purported deed in question cannot be a valid one, and the most that can be said for it is that it is testamentary and ambulatory in nature and fails to comply with the applicable statutes relating to Wills.

Obviously, a confidential and fiduciary relationship existed between Plaintiff Alice Kesler and her son, the Defendant David Kesler. Alice was about 80 years old when David became her Trustee in Trust of her entire estate. Alice testified that David, her Trustee in Trust, was one person she could rely upon and put her trust in, yet after David became Trustee in Trust, in the summer of 1971, he had by the summer of 1973, become

the proud possessor of a swather and bailer valued at $11,000.00, and a truck valued at about $4,000.00, which was purchased with Alice's money and for which she makes no claim. David has by his acts, attempted to take from his mother, while acting as her Trustee, an undivided interest in joint tenancy in her home. Alice did not give it to David. Alice testified that it was her intent to give her home in Fillmore to David by Will after her death, but David attempted to take not only the home by deed, but all her property located in Fillmore, Utah, plus an additional 640 acres located approximately 40 miles South of Fillmore, near Cove Fort, the additional Fillmore property and the property near Cove Fort having never been discussed in any way between the two of them even as a testamentary gift.

The most important security that elderly have is the security of knowing that they own their home, which they have struggled for, bought and paid for, during their lives. The security in knowing that no one can take their home away from them or kick them out of it any time they desire. David, however, desires to take that security and peace of mind from his mother and Trustor, in spite of what her intent was at the time she executed the purported deed, thinking it to be a Will and in spite of what his mother's intent is now, leaving his mother unsure of her own home and insecure in the ownership and peaceful

possession thereof. He further desires to take from his mother, while acting as her Trustee, an undivided interest in her rental units in Fillmore, Utah, which is the main source of her income, thereby causing her financial insecurity. Alice's testimony is clear, and David offered nothing to refute her testimony, with regard to the fact that the only thing that was to be made a gift to David, after Alice's death, was her home. David lived for a period of a month or more, right in the home of Alice's while she was having troubles with Joe and Calvin, and while there he told her how much he liked the arrangement of her home, and it was at that time that Alice told David that she wanted him to have her home after her death because none of the other members of her family had indicated that they cared for the arrangement of the home at any time, and just two days after part of Alice's troubles with Jce and Calvin were settled, David ends up with a deed to the property in question. What more can be said, other than David took advantage of his 80-year old mother while acting as her Trustee in Trust and induced her or tricked her into deeding her property to him by pretending to like her home and pretending to help and protect her from Joe and Calvin.

David says that the reason Alice gave him the property was because he had not received as much as the other children of Alice and Otto Kesler during his

lifetime, and that he not only felt justified in taking the property from Alice as a gift, but now feels that he is entitled to keep it even after he has heard from Alice's own lips what her true intentions were. This argument of David's might be valid if it was being used against the other heirs after Alice's death, but to use it against his own mother, to force her into making a gift to him during his lifetime, strikes at the very center of the conscience of the most petrified heart, and equity should not allow such a deed to stand.

This case differs from most of those cited in this brief, because Alice is still alive and well and able to tell the court what her true intent was when she signed what she thought to be a Will, and her intent is clear and unequivocal, to-wit: That David was not to get any interest in any of the property owned by her until after she had died and then he was only to get an interest in her home.

In determining Alice's true intent, the law tells us that we must look to all the facts and circumstances surrounding the transaction, both before and after the date of the questionable deed. Alice testified she talked to David about a Will, not a deed. She testified and David offered no evidence to contradict her testimony, that she paid the real property taxes on the 640 acres, as well as on her home and the rental units. She further

testified that she paid the maintenance and upkeep on her home and rental units, that she paid for all the major repairs on everything covered in the deed, that she maintained insurance on the property at her own cost and expense, that she collected rents on the rental units and kept the units rented, that she spent the money received from the rent as she saw fit; that she had the power and right to sell the property, and in fact did sell a vacant lot included in the questionable deed located in Fillmore, and all, not one-half, of the funds received from the sale of the lot went to Alice's bank account. None of the proceeds from the sale went to David. Alice further testified that she had a right to mortgage the property. David, in answer to a question about who paid the real property taxes, said, "Mama has always paid her taxes on her property."

This unequivocal, unguarded statement from David certainly shows David's true intent with regard to the ownership of the property, to-wit: Alice owned it and it was her responsibility to pay the taxes on her property. David testified that he thought he had some right in the property, but at the present time he did not intend to exert that right, that he thought that he should wait until his mother was deceased to exert such a right. This testimony certainly shows what David's intent, as well as his mother's intent was, to-wit: No property interest

should pass to David until his mother's death.

To further show the true intent of the transaction, David testified that he never reported any income, either Federal or State, on his tax returns at the time the purported deed was made. The reason given was that it was meant to be a gift. Yet, David did not, while acting as Trustee for Alice, cause to be filed a gift tax return for her, thereby evidencing the fact that the transaction was not to be presently effective, but that the property covered by the purported warranty deed was in total to remain in and be a part of Alice Kesler's estate, up until the time of her death. Note also that Alice and David, at all times, had legal counsel to advise them, but none advised them with regard to taxes and the effect of a joint tenancy warranty deed.

Let's look now for a moment at the legal advice that Alice got regarding the effect of a joint tenancy warranty deed. Eldon Eliason testified that he refused to give any advice with regard to the deed, that he would have nothing to do with the preparation of the same. His excuse being a conflict of interest because he drafted the Trust. Fred Finlinson, the attorney who prepared the purported deed, really couldn't remember specifically what he told Alice and David, but thought he advised her about joint tenancy deeds in general, but when asked specifically if he told Alice that she could not get her

property back, he replied that he did not think that the subject came up. Certainly it would be Mr. Finlinson's responsiblity to bring such a subject up. Mr. Finlinson further testified that he did not advise her that she was parting with a present interest in her property, to-wit: her home, and certainly Alice would have recalled if Finlinson would have said to her, "Hey, Alice, you're giving one-half of your home to David right now, today. Do you want that now, or wait until after your death?". Obviously, the question was never asked. It is a compliment to say that Alice received even poor advice, at best. The law is clear that Alice, when making a gift of her property in joint tenancy or otherwise, should receive and is entitled to receive, competent independent legal advice which is understandable to her and this is especially true where the Grantee in the deed is to be the beneficiary thereof and where the Grantee is a son and a Trustee in Trust holding a confidential and fiduciary relationship with the Grantor. Finlinson testified that a Will was never discussed, and that he never inquired about the balance of her estate and never advised her about a life estate or any alternative that she might take other than making a warranty deed with regard to her property. Finlinson did, however, indicate that he was knowledgeable of her problems with Calvin and Joe and it is further interesting to note that the only written memorandum that Finlinson made with regard

to what transpired in his office on the date the alleged deed was prepared by him, related to Alice's problems with Joe and Calvin, which is precisely what Alice testified that she went to Mr. Finlinson to talk about, to-wit: the validity of a joint tenancy deed between Alice and her husband, Otto Kesler, which had just been determined and upheld by the lower court two days before David got his parsimonious hands on the putative warranty deed. David offered no direct testimony to controvert what Alice said her true intent was at the time the reputed warranty deed was signed by her, to-wit: to make some kind of a gift to David to take effectonly after Alice's death. Neither could David provide the court with any extrinsic evidence to show that her intent was different than Alice testified it was.

David, when he accepted the position as Trustee for Alice, owed her the highest duty required by law, equity and conscience - to avoid even the mere semblence of over-reaching or unfair treatment, and David could not at trial show by his own testimony or by the testimony of others who he called to testify on his behalf, that the deed made between he and his mother creating the joint tenancy was what she intended, or that it was a fair transaction or that she was independently and properly advised. In fact, David took Alice to see Attorney Finlinson.

The law presumes the existence of fraud, overreaching,

and undue influence where such a relationship of trust and confidence exists between two people, as it existed between Alice and her son, and Alice testified and David did not deny the fact, that she signed papers in her own home which David brought to her. In fact she testified that the document in which David claims a one-half interest in Alice's property was misrepresented to her by David in that she thought she was signing a Will and that the part of the document which she signed which showed it's title, to-wit: Warranty Deed, was never shown to her at the time that she signed said document. She testified further, however, that it really didn't make any difference because she trusted David and would have signed any document which was put before her by David for her signature. This is the very essence of the law which requires the shifting of the burden from the Plaintiff-Appellant-Grantor to the Defendant-Respondent-Grantee, to show that the transaction was beyond question a fair, equitable and conscienable transaction, and David certainly failed to prove such in the instant case.

Alice testified unequivocally that her intent was to sign a Will leaving her home, only, to David after her death, but in fact the doucment she signed, thinking it to be a Will, turned out to be a warranty deed. The law is clear that a unilateral mistake on the part of the Grantor as to the nature of the document that she is signing is

grounds to void the document, in this instance, the deed. The law further allows the recision of a deed in cases where the grantor makes a unilateral mistake as to the amount of property conveyed or as to the particular property conveyed. Again, in the instant case, there was no intent on the part of the Grantor, Alice, to convey any property but in any event, there was not even any intent to execute a Will leaving any property to David after Alice's death, except her house, and certainly if the document which she intended to sign had been a Will, she would have been entitled to revoke that gift during her lifetime. Here again, Alice relief upon David to obtain the property description to put in the Will, and she had a right to rely upon him because he was her Trustee and he failed her.

And even if the document in question, (and we do not acknowledge for one second that she intended to sign a deed), had been a deed wherein Alice intended to convey only her home in joint tenancy to David, the deed should still be set aside because of the unilateral mistake on the part of Alice thinking that the document covered only her home.

Alice further testified that she had difficulty in ready even the big words on the documents, to-wit: Warranty Deed, at the top of the page, and that she could not read the fine print in which the description was made. In any

event, even if she could have read the descriptions, she could not recognize the same and relied upon David entirely to make an honest and fair deal according to her intent. Thus, the unilateral mistake, as to the nature of the document and the amount of property to be conveyed, coupled with the relationship of the parties being confidential and fiduciary in nature, is further grounds for setting aside the putative deed.

CONCLUSION

There was no intent on the part of the Grantor, Alice Kesler, at the time that she executed the document entitled "Warranty Deed", to pass an immediate present interest in the title to her real estate in question. Her intent was to make a testamentary gift of her home only to David to take effect at the time of her death, and not before, and therefore the deed is void as such because of a lack of intent to pass a present interest in the property and thus delivery of the same is ineffective and incomplete. The document is further void as a Will because it fails to comply with the applicable statutes relating to Wills.

The purported deed is further void for the reason of fraud and undue influence exerted upon Alice by David while acting in a confidential and fiduciary relationship with her, thereby shifting the burden from the Plaintiff-Appellant Alice to the Defendant-Respondent David to prove that

the transaction was unquestionably a fair one, which burden the Defendant-Respondent failed to meet.

The deed is further void for the reason that a unilateral mistake was made on the part of the Grantor Alice, with regard not only to the nature of the doucment which she was signing, to-wit: her intent was to make a Will, not a deed, and also as to the amount of property whcih was to be included in the document whch she was signing was in excess ofthe amount which Alice intended.

From the foregoing facts and law, it obviously appears that consicence, equity, and fair and honest dealings dictate and require that the deed in question be declared void and of no validity whatsoever and that Alice Kesler, the Plaintiff-Appellant herein be restored to the ownership of her property as described in the purported deed and that David Kesler, her son and former Trustee, be required to return to her by execution of a warranty deed, all of her property which he now holds a joint interest in with her, pursuant to the purported deed in question, and that said acts on David's part should be consummated forthwith, and the judgment declaring said deeds valid should be reversed.

Respectfully submitted

BYRON L. STUBBS